(2)

Supreme Court, U.S.
FILED
JUN 27 2005
OFFICE OF THE CLERK

No. 04-1357

IN THE

Supreme Court of the United States

TIMOTHY GIBLER,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR REHEARING

STEVEN BRUCE *
PEOPLE WITH DISABILITIES FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
III. REQUEST TO TAKE JUDICIAL NOTICE	3
IV. ARGUMENT	3-5
V. CONCLUSION	6
CERTIFICATION (RULE 44)	7
APPENDIX	B-i

TABLE OF AUTHORITIES

CASES	Page
Matthews v. Eldridge, 424 U.S. 319 (1976)	5
Schweiker v. Chilicky, 487 U.S. 412, 417 (1988)	3
UNITED STATES CODES	
42 U.S.C. § 421(m)(1)	2
42 U.S.C. § 423 (e)	3
42 U.S.C. § 423 (f)	3
42 U.S.C. § 423 (f), (g)	2
42 U.S.C. § 423 (f), (g) Pub. L. 98-460, §§ 2, 7, 98 Stat. 1794-1796, 1803-1804	3
42 U.S.C. § 423 (g)	3
42 U.S.C. § 423 (g)(2)	2
CONGRESSIONAL RECORDS	
130 Cong. Rec. 26000, 26145-26146 (1984); *see also id.*, at 6621; *id.*, at 13247	3

IN THE

Supreme Court of the United States

No. 04-1357

TIMOTHY GIBLER,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR REHEARING

I. INTRODUCTION

This case involves an individual, Timothy Gibler on social security disability benefits since 1979 due to chronic schizophrenia, who was retroactively terminated from benefit checks and Medicare resulting in a loss of the ability to provide for the ordinary necessities of life; e.g., food, rent, and clothing. His check benefits and Medicare were restored, in major part, by an Administrative Law Judge's decision. This Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on June 6, 2005.

II. STATEMENT OF FACTS

Congress made it clear that disability beneficiaries will receive benefits pending appeals of the Social Security Administration's termination reviews in the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423 (f), (g). These amendments came about because of numerous abuses. The reforms were intended to resolve constitutional due process issues so that anyone whether on Supplemental Security Income (Title XVI of the Social Security Act) or Social Security Insurance (Title II of the Social Security Act)[1] disability benefits could continue on benefits. Only those individuals on the Title II program after an Administrative Law Judge appeal decision could be charged with an overpayment of benefits if the final outcome was not in their favor. 42 U.S.C. § 423 (g) (2). Benefits paid Title XVI recipients are not counted as an overpayment if the outcome is not in their favor.

The Social Security Administration does not give beneficiaries check benefits and/or Medicare pending an appeal of an initial termination decision if they label the decision a work review as opposed to a medical review.

At the initial level the Social Security Administration has procedures in place to process reviews wherein an individual can receive benefits pending appeal by simply requesting them if the review is labeled a medical review. In this case where substantial psychiatric medical evidence[2] came to light in the review, the Social Security Administration, at the initial and reconsidered adjudication levels, refused to develop the medical evidence as it related to Petitioner's ability to work.[3]

---

[1] The program Petitioner Mr. Gibler is on.

[2] Petitioner was in a hospital psychiatric lock-up ward during this review. Petition for Writ of Certiorari, Appendix A, Ex. 20.

[3] Also see 42 U.S.C. § 421(m)(1) (December 17, 1999, effective January 1, 2001.)

III. REQUEST TO TAKE JUDICIAL NOTICE

Petitioner hereby requests this Court take judicial notice of facts referenced in Congress' Government Accountability Office Report No. 04-656 to Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives of July 2004, a public record. The source of virtually all the facts is the Social Security Administration. (Petition for Rehearing, Appendix B, Ex. 1.)

IV. ARGUMENT

42 U.S.C. 423 §§ (e) Engaging in substantial gainful activity . . . ., (f) Standard of review for termination of disability benefits . . . . ., and (g) Continued payment of disability benefits during appeal . . . must be read together when interpreting Congress's intent in providing for interim benefits pending appeal of a termination adjudication at the initial level. Pub. L. 98-460, §§ 2, 7, 98 Stat. 1794-1796, 1803-1804, 42 U.S.C. §§ 423(f), (g). "In its final form, this legislation was enacted without a single opposing vote in either Chamber. *See* 130 Cong. Rec. 26000, 26145-26146 (1984); see also *id.*, at 6621; *id.*, at 13247." *Schweiker vs. Chilicky*, 487 U. S. 412, 417 (1988). Thus, Congress drew the line in resolution of due process abuses at whether or not someone would be charged with an overpayment after appeal.

Mr. Gibler's Fifth Amendment violations as described in his Petition for a Writ of Certiorari occur when very low level agency representatives at local social security field offices terminate benefits while conducting so called "work" reviews. The abusive consequences of due process violations are of a degree of severity to justify this petition as evidenced by the Government Accountability Office (GAO) findings that the rules low level claims representatives use are not the same as the law and regulations used by the administrative

law judges.[4] According to the Social Security Administration's own records, 63% of all cases in 2003 were reversed by administrative law judges[5] and in 2003 it took on average 344 days to obtain a hearing.[6] An emergency Order to preserve the status quo and subsequent emergency Order on the merits in the United States Court of Appeals underscore the grave situation in which Mr. Gibler was placed by Respondent.[7]

In essence, the Government Accountability Office found that the Social Security Administration's progression eliminating these inconsistencies has resulted in the Government Accountability Office including federal disability programs on its list of "high risk government programs." The Social Security Administration has been unsuccessful in its partially implemented unification initiative.[8]

---

[4] Government Accountability Office Report No. 04-656 to Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives. (July 2004). Appendix B, Petition for Rehearing, Ex. 1. The GAO's report reveals systemic differences in adjudication of claims at these two levels. GAO Report, pp. 11, 14, (Appendix B, Ex. 1, pp. 6a, 7a, 8a). Adjudicators follow only on an internal manual, Program Operations Manual System (POMS), whereas Administrative Law Judges rely on law and regulation. *Id.*, p. 14, 15. FN 18 (9a). The GAO finds the social security administration does not identify the areas of inconsistencies between these two adjudication levels. *Id.*, pp. 23-24 (12a, 13a). The Social Security Administration expressed concerns including that this GAO report did not fully discuss progress the agency achieved in reducing inconsistency between its adjudication levels. *Id.*, p. 34, *et seq.* (14a, 15a)

[5] *Id.*, p. 7 (5a)

[6] *Id.*, p. 12, FN. 14. (7a)

[7] Petition for Certiorari, Appendix A, Ex. 9.

[8] Social Security Administration's unification process began in 1994. GAO Report, pp.1-2, (Appendix B, Ex. 1, p. 3a)

Traditional notions of due process require continuing benefits when people lose the ability to provide for the necessities of life prior to a judicial hearing. [9]

This petition asks this Court to align the Social Security Administration's termination procedures so that a beneficiary's due process rights are not violated by a termination of benefits before a judicial due process hearing. Although the Social Security Administration interim benefits are afforded pending appeals of "medical" reviews, the Social Security Administration does not afford continuing benefits pending appeals of "work" reviews. Congress' passage of its 1984 reform measures have been abused by Respondent's practice of terminating essential benefits required for survival before a judicial due process hearing.

There are no medical professionals, attorneys or judges in or utilized by the field offices where social security "claims representatives" make initial adjudications to terminate an individual's sole means of support *before* having an opportunity for a judicial hearing. In the present case the Administrative Law Judge took medical evidence of disability into account in reversing the lower level adjudication, as any other administrative law judge should have done.[10] The field offices do not rely on law or regulation but on the Social Security Administration's internal rules, Program Operations Manual System (30,000 pages)[11] required to be followed by the Agency's low/first level adjudicators.

---

[9] *Mathews v. Eldridge*, 424 U.S. 319 (1976) applied to people with modest income and was overruled by Congress by the 1984 reform amendments to the Social Security Act.

[10] Appendix A to Petition for Certiorari, Appendix A, Ex. 17.

[11] GAO Report, p. 15. FN 18, (Appendix B, Ex. 1, p. 9a)

V. CONCLUSION

Based on the foregoing, Petitioner requests that his Petition for Rehearing be granted.

Respectfully submitted,

STEVEN BRUCE *
PEOPLE WITH DISABILITIES FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner

Certification of Counsel (Rule 44)

I certify that the Petition for Rehearing is presented in good faith and not for delay. The grounds not covered heretofore include congressional findings in a July 2004 Government Accountability Office report (Appendix B, Ex. 1 of Petition for Rehearing) that Respondent applies different rules in its internal manual, Program Operations Manual System (POMS) than in law and regulations used at the Social Security Administration's Office of Hearings and Appeals where administrative law judges issue written decisions after hearings.

Dated: June 27, 2005

/s/ _____

Steven Bruce
Counsel for Petitioner

APPENDIX

Appendix B-i

TABLE OF CONTENTS[1]

Page

Exhibit 1. Excerpts from Government Accountability Office, formerly General Accounting Office, Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives dated July 2004 by The Social Security Administration entitled More Effort Needed to Assess Consistency of Disability Decisions. GAO-04-656 ..... 1a

[1] Counsel has reviewed scanned reproductions of original documents and certifies that to a substantial extent, they are true and correct replicas of the original documents.

EXHIBIT 1

United States General Accounting Office

Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

---

SOCIAL SECURITY ADMINISTRATION
More Effort Needed to Assess Consistency of Disability Decisions

---

July 2004

GAO-04-656

[1] United States General Accounting Office
Washington, DC 20548

July 2, 2004

The Honorable E. Clay Shaw, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Dear Mr. Chairman:

The Social Security Administration (SSA) is the nation's largest provider of income assistance to individuals with disabilities, paying $91 billion in federal benefits to 11.4 million beneficiaries with a disability and their families in 2003.[1] Each year, about 2.5 million people file claims with SSA for disability benefits. State agencies called Disability Determination Services (DDS) decide whether claimants meet SSA's definition of disability by applying SSA's decision-making criteria. If a DDS ultimately decides, after an initial determination and then a reconsideration of this decision, that a claimant does not meet SSA's definition for disability, the claimant may appeal to the hearings level, where an SSA Administrative Law Judge (ALJ) reviews the claim to decide if the claimant should be allowed benefits. About one-third of disability claims denied at the state level were appealed to the hearings level; of these, SSA's ALJs have allowed over one-half, with annual allowance rates fluctuating between 58 percent and 72 percent since 1985. While it is appropriate that

[1] The figures include federal payments for the Disability Insurance and the Supplemental Security Income programs to beneficiaries who have a disability or are blind and their families.

some appealed claims, such as those in which a claimant's impairment has worsened and prohibits work, be allowed benefits, representatives from SSA, the Congress, and interest groups have long been concerned that the high rate of claims allowed at the hearings level may indicate that decision makers at the two levels are interpreting and applying SSA's criteria differently. If this is the case, adjudicators at the two levels may be making inconsistent decisions that result in similar cases receiving dissimilar decisions.

Concerned about the possibility that adjudicators are making inconsistent decisions, SSA embarked on a "process unification" initiative in 1994 with [2] the goal of ensuring that adjudicators at both levels consistently apply SSA's policy guidance and make similar decisions on similar cases. Partly on the basis of early studies of potential causes of inconsistent decisions, SSA included in its process unification initiative efforts to provide consistent guidance to all adjudicators, clarify policy, provide training, test potential process changes, and perform a new quality review of allowances decided by ALJs. However, SSA continues to face challenges in its efforts to provide consistent disability decisions. These challenges, and others associated with modernizing its disability programs, contributed to our decision to include federal disability programs on our list of high-risk government programs.[2] In September 2003, SSA's Commissioner unveiled a new proposal that laid out the vision of a long-term strategy for improving the disability decision-making process and helping people with disabilities return to work. Several of the changes in the new proposal are intended to improve the accuracy, timeliness, and consistency of decisions, such as having the DDS decision makers more fully develop and

---

[2] For additional information on the major problems facing federal disability programs and our decision to designate them as high-risk, see U.S. General Accounting Office, *High-Risk Series: An Update*, GAO-03-119, (Washington, D.C.: January 2003).

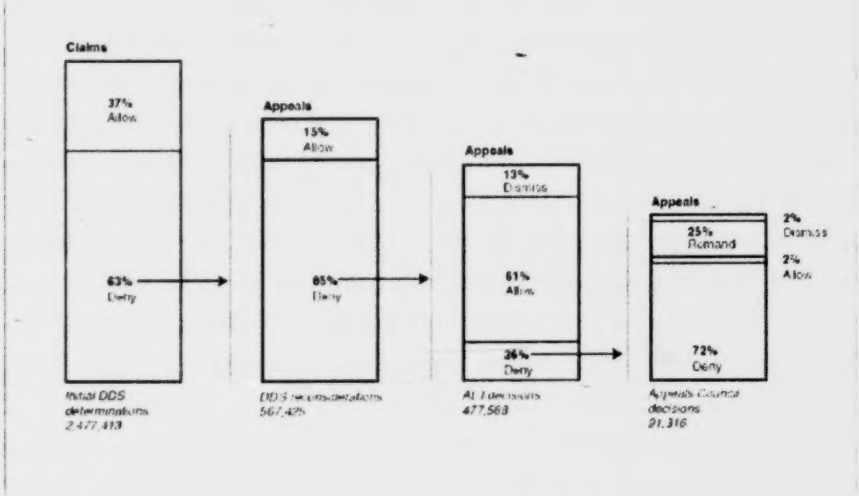
document their decisions, providing for centralized quality review of all decisions, and providing both adjudication levels equal access to medical expertise.

In response to your interest in the effectiveness of SSA's past and future efforts to improve and assess the consistency of decisions between levels, we evaluated these agency efforts. Specifically, we examined (1) the status of SSA's process unification initiative, (2) SSA's assessments of possible inconsistencies in decisions between adjudication levels, and (3) whether SSA's new proposal incorporates changes to improve consistency in decisions between adjudication levels.

To assess the extent to which SSA has implemented its planned activities under the initiative, we evaluated agency documentation describing SSA's process unification efforts. To evaluate SSA's efforts to assess consistency in decisions between levels, we interviewed officials from SSA's Office of Quality Assurance and Performance Assessment (OQA) and reviewed summary data and reports from SSA's quality assurance and performance management systems, including findings from SSA's Disability Hearings Quality Review, which is a quality review of DDS adjudicators' and ALJs' decisions and the associated case files. While we evaluated SSA's methods

* * * *

[7] Figure 1: SSA's Disability Decision-Making Process and Out-comes for Fiscal Year 2003



Source: SSA data

Notes:

The data provided by SSA did not include the number or rate of claims appealed to the next decision step. Without this information, we cannot determine the extent to which claimants appealed or abandoned their denied claims.

Twenty-five percent of the initial DDS determinations are subject to an alternative process that does not include the reconsideration step.

Under certain specified circumstances, ALJs and Appeals Council judges can dismiss a claim. For example, an ALJ can dismiss a claim if the claimant's request for a hearing is not timely and lacks a good cause for the delay.

The Appeals Council can remand a claim by returning it to an ALJ for further proceedings and a new hearing decision.

Because of rounding, decisional outcomes may not equal 100 percents

* * * *

[11] Despite SSA's process unification efforts and related studies to improve the consistency of decisions, recent ALJ allowance rates—which declined after process unification began, but started increasing in 1999 to reach 61 percent in fiscal year 2003—still raise questions as to whether initial- and hearings-level decision makers are consistently applying the agency's guidance. In addition to inconsistent application of SSA's policy guidance, there are several other reasons why a large number of ALJ allowances are made. For example, some ALJ allowances should be expected because, by law, cases can remain open throughout the hearings process, allowing new evidence to be submitted that may not have been available to the state adjudicators. Such new evidence could show that the claimant's condition has worsened and prohibits work. Also, SSA's decision-making criteria require that a great deal of professional judgment be applied. As a result, some allowances at the hearings level could simply reflect the differing judgments of two adjudicators reviewing a case. While a claimant's deteriorating health, changes in the characteristics of a claim over time, and the complexity of disability decisions may help to explain some of the ALJ allowances, studies have not sufficiently explained why consistently over half the cases appealed to the hearings level are allowed. Instead, studies indicate that systemic differences in the assessment of claims at both adjudication levels are contributing to the ALJ allowance rate. For example, our 1997 report noted a difference in state DDSs' and ALJs' views on the claimant's functional abilities was a key factor in explaining why ALJs allowed cases on appeal.

Inconsistency in decisions may create several problems. High hearings allowance rates may create the perception that the hearings level is applying SSA's criteria less strictly than the initial level and create an incentive for claimants to appeal to

an ALJ for a more favorable decision.[13] If deserving claimants must appeal to the hearings level for benefits, this situation increases the burden on claimants, who must wait, on average, almost a year for a hearing decision and frequently incur extra costs to pay [12] for legal representation.[14] In addition, to the extent that the ALJ allowance rates include inappropriate allowances, SSA could be incurring unwarranted program costs. Although SSA has tried to address these problems, its inability to resolve them has contributed to our decision to include federal disability programs on our list of high-risk government programs.[15]

Renewing its effort to address long-standing and critical problems with the disability programs, SSA's Commissioner recently announced a new proposal to improve these programs. (See app. I for an excerpt of the announcement that describes the newly proposed decision-making process.) In addition to proposing demonstration projects that provide work incentives and supports to help people with disabilities return to work, SSA has proposed significant changes to both the process of adjudicating disability claims and the structure and management of the agency's quality management system

---

[13] An appeal adds significantly to costs associated with making a decision. According to SSA's Performance and Accountability Report for fiscal year 2001, the average cost per claim for an initial DDS disability decision was about $583, while the average cost per claim of an ALJ decision was an estimated additional $2,157.

[14] An appeal also significantly increases the time required to reach a decision. According to SSA's Performance and Accountability Report for fiscal year 2003, the average number of days that claimants waited for an initial decision was 97 days, while the number of days they waited for an appealed decision was 344 days. However, the time a claimant waits for a decision should not impact the amount of benefits received, as benefits are based on the date the claimant becomes disabled.

[15] U.S. General Accounting Office, *Performance and Accountability Series: Major Management Challenges and Program Risks: Social Security Administration*, GAO-03-117 (Washington, D.C.: January 2003).

to improve the timeliness, accuracy, and consistency of the disability decision-making process. The agency believes that several of these changes will help to improve consistency between DDS and ALJ decisions. For example, SSA plans to provide more centralized end-of-line quality reviews. According to SSA, the proposed quality reviews should help to hold adjudicators more accountable for their decisions and ensure that they consistently apply SSA's policies as well as help the agency detect and amend those policy areas leading to inconsistent decisions. Table 2 provides a description of SSA's proposed changes to improve the disability decision-making process.

* * * *

[14] implementing its new proposal. SSA's implementation of the new proposal will therefore be no earlier than October 2005. In the meantime, SSA continues to discuss the proposal with stakeholders and plans to further refine it before implementation.

SSA Has Partially Implemented Its Process Unification Initiative

SSA has partially implemented its process unification initiative. Although the agency initially made improvements in its policies and training intended to improve the consistency of decisions between adjudication levels, it has not continued to actively pursue these efforts. As part of the initiative, the agency also implemented a review of ALJs' allowance decisions to identify additional ways to improve training and policies, but no new changes were made as a result of findings from the review. Finally, the agency also began two tests of process changes to help improve the consistency of decisions, but one ongoing test with design problems is not likely to lead to any conclusive results and the other test has been abandoned.

SSA Made Early Progress Improving Policies and Training, but Has Not Actively Pursued These Efforts

While SSA initially made progress carrying out efforts to improve policies and training to better ensure the consistency of decisions, the agency has not continued to actively pursue these efforts. SSA quickly accomplished most of its planned efforts to clarify policy guidance. In 1996, SSA issued nine process unification rulings to clarify policy areas it found to be contributing to inconsistent decisions. For example, one ruling provided all adjudicators with guidance on how to weigh and document their evaluation of the treating physician's opinions when making a disability decision.[16] SSA successfully went through the regulatory process several years later and published three new regulations to strengthen its process unification rulings, but was unable to agree on a fourth regulation regarding the weight to be given to the treating physician's opinion when evaluating a claim.[17]

SSA planned to develop a single presentation of policy guidance to replace the different sources used by each level, but has since abandoned full implementation of these plans in favor of a more limited approach. DDS [15] adjudicators currently follow a detailed set of policy and procedural guidelines,[18] whereas ALJs rely directly on statutes, regulations, and rulings for guidance in making disability decisions. To help ensure that inconsistent guidance was not contributing to

---

[16] *Social Security Ruling 96-2: Policy Interpretation Ruling Titles II and XVI: Giving Controlling Weight to Treating Source Medical Opinions*, effective July 2, 1996.

[17] Since SSA rulings are binding only on SSA adjudicators and do not have to be followed by the courts, SSA planned to strengthen the impact of several rulings by creating regulations that would be followed by the courts.

[18] These guidelines—called the Program Operations Manual System (POMS)—contain, within an estimated 30,000 pages, interpretations of relevant statutes, regulations, and rulings and procedural information.

inconsistent DDS and ALJ decisions, SSA began issuing guidance in the same wording to all adjudicators in 1996. Although SSA had also planned to address differences in policy guidance issued before 1996 and to eventually combine existing adjudication policy documents into a single document, it ultimately decided not to take these additional steps. According to SSA, further efforts to unify the policy guidance used by both levels would be a massive undertaking and not worth the cost because the guidance issued since 1996 had already addressed important policy areas that were leading to inconsistent decisions. While some stakeholder groups representing adjudicators tended to agree with SSA's position, the Social Security Advisory Board and other groups still believe the agency should take additional steps to provide a unified policy guide to all adjudicators. Instead of creating one policy manual for all adjudicators, SSA told us that it plans to undertake a comprehensive effort to evaluate and improve its disability policies to make them less susceptible to differing interpretations and to ensure they are up to date. A more comprehensive approach could address key weaknesses in SSA's disability program that we previously highlighted in our performance and accountability series, and thereby help to modernize federal disability programs to better meet the needs of Americans with disabilities.

Early on, SSA also provided extensive cross-training of DDS and ALJ adjudicators, although the scope of its efforts has since diminished. To help all adjudicators understand how to appropriately apply process unification rulings, SSA provided extensive and mandatory training in 1996 and 1997 to 15,000 disability adjudicators (including DDS examiners, physicians, ALJs, and quality assurance staff). The training was provided to adjudicators at all levels of the process in three of the most complex disability areas—assessment of symptoms, treatment of expert opinions, and assessment of claimants' remaining capacity to work (i.e., residual functional capacity). While this training was intended to be ongoing, SSA's training ef-

forts have diminished significantly since 1997. Stakeholder groups representing DDS adjudicators told us that SSA's training does not

* * * *

[23] both levels are making more consistent decisions. Although the 1994 report of findings from the initial biennial case review included the results of a special probe in which ALJs reviewed 165 DDS reconsideration denial decisions, the sample was not representative, and therefore results could not serve as a baseline for developing trend information. In 2003, SSA began another probe, in which ALJs reviewed 400 DDS reconsideration denial determinations, but the agency does not plan to release its findings until summer 2004.

Although SSA has limited information on how ALJs view DDS decisions, other information collected by the agency suggests that consistency of decision making at the initial level might not be improving. For example, OQA reviewers routinely assess the accuracy and supportability of DDS decisions. A recent SSA study of these data shows that the accuracy of DDS denial decisions—those decisions most likely to be appealed to the hearings level—has declined by 4 percentage points over a 1- year period.[26] Another review of DDS decisions by OQA reviewers also suggests a lack of improvement at the initial level. Specifically, the extent to which quality reviewers found that DDS reconsideration denials appealed to the hearings level were supported declined from 71 percent in fiscal year 1993-94 to 68 percent in fiscal year 1999-2000.

---

[26] See the Social Security Administration, Office of Quality Assurance and Performance Assessment, *Quality Assurance Group I Initial Denial Accuracy Report: August-October 2002*, July 2003.

SSA's Assessments Have Not Identified the Areas and Causes of Possible Inconsistency in Decisions between Adjudication Levels

Despite some efforts to assess inconsistency in decisions, shortcomings in SSA's analyses also limit its ability to identify areas and causes of possible inconsistency. Most notably, over the last 10 years, SSA has not updated its prior analyses of information from its initial biennial case review that helped identify problem areas. In addition, SSA has not improved on its case review and analysis by ensuring that reviewers assess all relevant case evidence used to make decisions, or performed more sophisticated analysis to identify the areas and causes of inconsistency in decisions. Other efforts—including the review of ALJ allowances and a probe of DDS reconsideration denials—have yet to yield useful information.

In 1994, for its initial biennial case review report, the agency took its first step in identifying areas of possible inconsistency by identifying two characteristics about the claimants and their cases over which initial-level [24] reviewers tended to disagree with ALJs. Specifically, the 1994 report concluded that teams of reviewing medical consultants and disability examiners sometimes viewed cases involving mental impairments differently than the reviewing ALJs. In addition, these two sets of reviewers tended to have different views on the severity of claimants' impairments and their resulting capacity to work. According to the official responsible for overseeing the review, the findings in this initial report provided important support for SSA's process unification efforts as well as the agency's efforts to redesign the disability claims process.

SSA continues to conduct the biennial case reviews; however, the agency has not continued to analyze and identify areas that are viewed differently by different adjudication levels. Specifically, SSA no longer identifies the particular case characteristics over which reviewers from the two levels tend

to disagree. As a result, SSA does not know whether previously identified problem areas are still present. Moreover, SSA no longer publishes any information from the medical consultant and disability examiner biennial case reviews, even though it has performed some limited analysis of the supportability of decisions made by adjudicators. By not continuing to publish its analysis and findings, the agency makes it difficult to ensure the reliability of its methods and results, and leaves stakeholders outside the agency, including disability groups, without a means for understanding SSA's assessment efforts and progress in improving the consistency of decisions. The SSA office conducting the study has told us that, because of downsizing and competing priorities, it has no current plans to further analyze and publish these data.

Further, in its ongoing biennial case reviews, SSA does not make full use of available case information that would be useful in identifying areas and causes of inconsistency. Specifically, medical consultants and disability reviewers do not listen to tapes of the hearings and therefore do not review the entire case as presented to the original ALJ. Although reviewing medical consultants and disability examiners read the ALJs' explanations for their original decisions, which should include the most important factors behind the ALJs' decisions, the reviewers do not evaluate the oral evidence independently. An SSA official with whom we spoke indicated that some evidence entered by witnesses at the hearing might not be accompanied by other hard copy sources of the same information. Therefore, reviewers would not consider information potentially relevant to the ALJ's decision that could be used to identify areas and causes of inconsistency.

* * * *

[34] factors that might be contributing either appropriately or inappropriately to allowance decisions.

3. Expand the biennial case review by requiring disability examiners and medical consultants to review the hearing tapes to ensure that reviewers have the complete case before them (including the types and sources of testimonial evidence provided during the hearings) when evaluating the ALJs' decisions.

4. Have adjudicators and reviewers from each level study cases in depth to help pinpoint the causes of inconsistency, once potential areas of inconsistency between levels are identified.

5. Publish the methods and findings of all analyses, to keep internal and external stakeholders aware of the agency's efforts to assess consistency and demonstrate improvement over time.

6. Use the information from these improved analyses to develop a more focused and effective strategy for ensuring uniform application of SSA's guidance and to improve the consistency of decisions. To accomplish this, SSA should clarify guidance for making disability decisions and develop mandatory training for adjudicators on issues identified as contributing to inconsistency.

Agency Comments and Our Evaluation

We provided a draft of this report to SSA for comment. SSA expressed several reservations about the recommendations, findings, and conclusions of our report. Primarily, SSA took issue with: (1) our characterization of the agency's progress over the past several years in analyzing and reducing the inconsistency of decisions, (2) our recommendation that the agency incorporate multivariate analysis into its assessments, and (3) our finding that the agency has not acted on the results of its reviews of decisions. SSA indicated that it would

reevaluate our recommendations as the design of its Commissioner's new approach to disability decision making evolves. However, the agency did agree to pilot one recommendation—that quality reviewers assess hearing tapes when evaluating the ALJs' decisions—as part of a quality review.

One of SSA's main concerns was that our report did not fully discuss the progress SSA had achieved in analyzing and reducing the inconsistency in decision making between adjudication levels. For example, SSA commented that our report dismissed the 21-percentage point increase in the quality reviewers' support rate of ALJ decisions, conducted as part of [35] SSA's biennial case reviews over the last 10 years. SSA also pointed to findings from its ALJ peer reviews as additional evidence that the quality and consistency of SSA's decisions had improved. In addition, SSA asserted that its comparison of the relative proportion of allowances at the DDS and ALJ levels, along with high accuracy rates, indicated that adjudicators were making the right decisions sooner in the process—a goal of both process unification and the Commissioner's new disability approach. Although our report incorporates results from the analyses cited by SSA, our conclusion about the improvement in consistency between levels is not as optimistic as SSA's because of weaknesses in SSA's assessments. As we reported, SSA's analysis of the quality reviewers' assessment of ALJ cases has been limited for 10 years to calculating ALJ support rates. SSA has not used available data to determine the potential areas of inconsistency between levels or the extent to which changes in the ALJ support rate is related to improvements in consistency of decisions between adjudication levels. SSA's assessment also lacks a reliable method for determining whether DDS decisions are more consistent with ALJ decisions, for example, by having ALJs regularly review a statistical sample of DDS decisions. Lastly, as we pointed out, changes in the proportion of overall allowances made by the DDS and ALJ

* * * *